

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re: CLOUD PEAK ENERGY, INC., <i>et al.</i> , <div style="text-align: right;">Debtors.</div>	: : : : : : :	Chapter 11 Case No. 19-11047 (KG) Jointly Administered Re: Docket Nos. 31, 368 Hearing: July 18, 2019, at 10:00 a.m. EDT
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**CAMPBELL COUNTY’S LIMITED OBJECTION TO
DEBTORS’ DIP FINANCING MOTION, AS SUPPLEMENTED**

The Board of Commissioners of Campbell County, Wyoming, solely in its official capacity (“**Campbell County**” or the “**County**”), and by and through its undersigned counsel, hereby makes this limited objection to the *Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing Secured by Senior Priming Liens and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief*, filed May 12, 2019 (ECF No. 31) (“**Original DIP Financing Motion**”), as supplemented by the *Supplement to Motion of Debtors for Entry of Interim and Final Orders (I) Authorizing the Debtors to (A) Obtain Postpetition Financing Secured by Senior Priming Liens and (B) Use Cash Collateral, (II) Granting Liens and Providing Superpriority Administrative Expense Status, (III) Granting Adequate Protection, (IV) Modifying the Automatic Stay, and (V) Granting Related Relief*, filed June 28, 2019 (ECF No. 368) (as so supplemented, “**DIP Financing Motion**”).

INTRODUCTION

At least three of the Debtors, Antelope Coal LLC, Cordero Mining LLC, and Cordero Oil & Gas LLC (“**Taxpayer Debtors**”), owe Campbell County more than \$8 million in unpaid *ad valorem* property taxes on mineral production within the County—also referred to as gross product

mine taxes. Under Wyoming law, such *ad valorem* taxes give rise to multiple statutory liens. One such lien became perfected in favor of the County when the gross product mine taxes at issue were imposed and assessed. Thus, the County holds liens against property of the Taxpayer Debtors. And, as these liens perfected well before the Debtors' bankruptcies, they are senior to any liens granted and perfected under the terms of the Debtors' DIP Financing Motion.

Nevertheless, the Debtors recently "supplemented" their Original DIP Financing Motion to request a ruling from this Court in the final DIP financing order that Campbell County does not hold any lien that could be superior to those securing the Debtors' proposed DIP financing. The Debtors are thus requesting a final DIP financing order that would effectively subordinate Campbell County's preexisting, senior liens without the County's consent and without providing the County with adequate protection as required under the Bankruptcy Code. Furthermore, the Debtors' attempt to adjudicate the existence, extent, and priority of the County's liens as part of their DIP Financing Motion are procedurally improper. Such an adjudication must take place in the context of an adversary proceeding.

For these reasons explained more fully herein, this Court should reject the Debtors' attempt to subordinate or extinguish the County's preexisting, senior liens through the proposed ruling in the final DIP financing order.

BACKGROUND

The Taxpayer Debtors are liable to Campbell County for gross product mine taxes that arise from their production (i.e., extraction) of minerals, including coal, oil, and gas, from within the County. Liability for the gross product mine tax arises as the minerals are removed from the

ground,¹ but the tax itself is assessed, calculated, and billed approximately one year in arrears.² Thus, for example, gross product mine taxes for the 2016 production year were invoiced in August 2017 and payable in two equal installments in November 2017 and May 2018; taxes for the 2017 production year were invoiced in August 2018 and payable in two equal installments in November 2018 and May 2019.

Here, the Taxpayer Debtors have failed to pay their May 2019 installments of the gross product mine taxes assessed in 2018. Indeed, the Debtors conveniently filed for bankruptcy on the exact day that the unpaid installments, totaling more than \$8 million, were due: May 10, 2019.³ As a result, the Taxpayer Debtors were protected by the automatic stay before the May 2019 installment of taxes became delinquent.

Two days after filing chapter 11, the Debtors filed their Original DIP Financing Motion. The Original DIP Financing Motion contemplated that the Debtors would receive financing secured by liens granted to those providing the financing (“**DIP Liens**”). The Original DIP Financing Motion requested that the DIP Liens be granted priority over all other liens with the exception of, *inter alia*, “**DIP Permitted Prior Liens**,” which include:

any valid, perfected, and non-avoidable liens in the Debtors’ property solely to the extent permitted by section 546(b) of the Bankruptcy Code, and . . . any other valid, perfected, and non-avoidable liens in favor of third parties that were in existence

¹ 011-0005-6 Wyo. Code R. § 5(a) (West 2019).

² Wyo. Stat. Ann. § 39-13-107(b)(i)(D).

³ The County intends to file proofs of claim for the full amount of the unpaid installments. In addition, the County intends to file proofs of claim against the Taxpayer Debtors for tax deficiencies from tax years 2014 through 2016, which were recently discovered in a Wyoming state audit of the Taxpayer Debtors’ mineral production.

immediately prior to the Petition Date and identified as such on a schedule to the DIP Credit Agreement.⁴

The Debtors did not—and still have not—provided any schedules to indicate what liens would be considered “DIP Permitted Prior Liens.” Thus, until very recently, Campbell County had no notice that the Debtors would not be treating the County’s prior liens as “DIP Permitted Prior Liens.”

On June 28, 2019—weeks after the deadline for objecting to the Original DIP Financing Motion had passed—the Debtors supplemented the Original DIP Financing Motion to request that this Court’s final order approving the DIP Financing Motion contain the following ruling:

Neither Campbell County, Wyoming nor Converse County, Wyoming holds any lien, interest or claim on and in respect of *ad valorem* taxes, gross proceeds taxes, or any other amounts owed by any of the Debtors to either of the Counties that constitutes a DIP Permitted Prior Lien.⁵

This was the first time the County received notice that the Debtors intended to subordinate, if not extinguish, the County’s prepetition liens.

ARGUMENT

The Debtors attempt to justify their proposed ruling that the County has no DIP Permitted Prior Liens by noting that the County has not recorded any lien in accordance with Wyo. Stat. Ann. § 39-13-108(d)(vi). This statute provides that gross product mine taxes are liens against property of delinquent taxpayers that must be recorded to be perfected.⁶ However, as discussed below, under Wyoming law, such liens are only one of two types of liens created on account of the gross product mine tax.

⁴ See Interim Order Granting DIP Financing Motion ¶ 9.a.iii, entered May 15, 2019 (ECF No. 106) (“**Interim DIP Financing Order**”).

⁵ DIP Financing Motion at 6; *see also* Form of Proposed Final DIP Order ¶ 9(b), at 23, attached as Exhibit A to the Debtors’ DIP Financing Motion (ECF No. 368-1).

⁶ *Id.*

The Debtors fail to acknowledge that Wyoming law also provides that such taxes are liens on certain property of the person against whom the tax is assessed, and those liens perfect automatically in favor of the County.⁷ Under Wyoming law, those liens are subordinate only to prior existing liens⁸ and therefore should qualify as DIP Permitted Prior Liens.

Nonetheless, the ruling requested in the DIP Financing Motion would, at the very least, subordinate these liens to the DIP Liens without meeting the requirements for doing so under the Bankruptcy Code. Moreover, the requested ruling requires an adversary proceeding; as such, the Debtors' attempt to secure it through the DIP Financing Motion is inappropriate and procedurally improper. For all of these reasons, the Court should reject the Debtors' requested ruling that would subordinate, if not expunge, the County's prepetition liens to the DIP Liens.

I. The Gross Product Mine Tax Vests the County with Two Types of Statutory Liens, One of Which Is Especially Relevant Here—the Subsection (d)(i) Lien

The gross product mine tax is imposed, administered, and enforced pursuant to Wyo. Stat. Ann. § 39-13-101, *et seq.* Administered for the most part by boards of county commissioners, the gross product mine tax in Wyoming is a main source of revenue not only for county governments, but also for other local government entities, such as school districts and hospital districts, for whom the county commissioners have statutory responsibility to administer taxation.⁹

Under Wyoming law, when coal and other minerals are extracted or “severed” from a mine, they become personal property subject to taxation.¹⁰ The gross product mine tax is an *ad valorem* tax on the ownership of such extracted minerals—more specifically, on the taxpayer's share in the

⁷ Wyo. Stat. Ann. § 39-13-108(d)(i).

⁸ *Id.*

⁹ Wyo. Stat. Ann. § 39-13-104(b).

¹⁰ *See Young v. Young*, 709 P.2d 1254, 1257 (Wyo. 1985).

value of a mineral deposit's total output realized over the course of the previous calendar year.¹¹ It has long been held in Wyoming, therefore, that the gross product mine tax is an *ad valorem* tax on personal property that is created when a mineral is extracted from a mine.¹²

As a tax that applies to personal property *and* mineral production, the gross product mine tax gives rise to two different statutory liens. The first is set out in Wyo. Stat. Ann. § 39-13-108(d)(i), which describes the lien created by taxes on personal property. That section provides:

Taxes upon personal property are a lien upon all real property owned by the person against whom the tax was assessed subject to all prior existing valid liens. Taxes upon personal property are a lien upon the [taxed] personal property until paid[.]¹³

This lien will be referred to as the “**Subsection (d)(i) Lien.**”

Meanwhile, section 39-13-108(d)(vi) of the Wyoming Statutes sets forth the lien created on account of taxes on mineral production. It provides:

All taxes, fees, penalties and interest imposed upon mineral production under this article are an automatic and continuing lien in favor of the county in which the mineral was produced. . . . The lien is on all property in the county, real, tangible and intangible, including all after acquired property rights, future production and rights to property, of any delinquent taxpayer[.]¹⁴

This lien will be referred to as the “**Subsection (d)(vi) Lien.**”

Under Wyoming law, liens such as these that “are purely statutory . . . must be strictly construed.”¹⁵ Under this interpretive principle, a statutory lien is perfected and enforceable

¹¹ See *Bd. of Comm’rs of Sweetwater Cty. v. Bernardin*, 74 F.2d 809, 814 (10th Cir. 1934); *Wyo. State Tax Comm’n v. BHP Petrol. Co. Inc.*, 856 P.2d 428, 434 (Wyo. 1993); *Miller v. Buck Creek Oil Co.*, 269 P. 43, 44 (Wyo. 1928); see also *Sutherland v. Meridian Granite Co.*, 273 P.3d 1092, 1098 (Wyo. 2012) (Hill, J., dissenting);

¹² *Ashland Oil Co. v. Jaeger*, 650 P.2d 265, 268 (Wyo. 1982) (citing *Oregon Basin Oil & Gas Co. v. Ohio Oil Co.*, 248 P.2d 198, 203 (Wyo. 1952)).

¹³ Wyo. Stat. Ann. § 39-13-108(d)(i).

¹⁴ *Id.* § 39-13-108(d)(vi)(A).

¹⁵ *Cities Serv. Oil Co. v. Pubco Petrol. Corp.*, 497 P.2d 1368, 1371-72 (Wyo. 1972).

pursuant only to the terms of the statute that creates it.¹⁶ Thus, for example, where a statute requires that a statutory lien be recorded and filed to be perfected and enforceable, courts are not free to disregard those formalities in determining the status and priority of the lien.¹⁷ On the other hand, courts are not free to invalidate or subordinate a statutory lien for failure to record it, where the governing statute makes the lien in question enforceable without requirement for recordation.¹⁸

II. Wyoming Law Does Not Require Recordation to Perfect the Subsection (d)(i) Lien

The statutes governing the Subsection (d)(i) Lien and the Subsection (d)(vi) Lien provide that both liens are created when the gross product mine tax arises, but contain different requirements for the liens to become perfected. Under Wyoming law, the gross product mine tax *is* both a Subsection (d)(i) Lien and a Subsection (d)(vi) Lien;¹⁹ therefore, both liens are created when the tax itself arises because the tax and the lien are one and the same. Liability for the gross product mine tax arises as soon as the relevant minerals are removed from the ground and, thus, become taxable personal property.²⁰ Therefore, both the Subsection (d)(i) Lien and the Subsection (d)(vi) Lien are created at the exact moment that the relevant minerals are extracted.

¹⁶ See *Mary's Bake Shoppe v. City of Cheyenne*, 193 P.3d 252, 257 (Wyo. 2008) (holding statutory lien created and made effective when its own terms are fulfilled); see also Am. Jur. 2d, State and Local Taxation § 781 (2012) (“The [tax] lien exists and attaches only according to the terms and conditions prescribed by the statute creating it.”).

¹⁷ See *Petra Energy, Inc. v. Dep’t of Revenue, State of Wyo.*, 6 P.3d 1267, 1272 (Wyo. 2000).

¹⁸ See *Mary's Bake Shoppe*, 193 P.3d at 258 (failure to record statutory lien did not affect its enforceability where ordinance creating lien contained no recordation requirement for enforcement).

¹⁹ Wyo. Stat. Ann. § 39-13-108(d)(i) (“Taxes upon personal property are a lien”) & 108(d)(vi)(A) (“All taxes, fees, penalties and interest imposed upon mineral production under this article are an automatic and continuing lien”).

²⁰ 011-0005-6 Wyo. Code R. § 5(a) (West 2019).

Under the relevant statutes, these liens diverge with respect to how they are perfected. With respect to the Subsection (d)(vi) Lien, Wyoming law makes plain that “in order to perfect . . . a tax lien under this paragraph, the county treasurer shall file a notice of the tax lien and a certified copy of the delinquent tax statement with the clerk and recorder of the real estate records”²¹ As such, recordation is a plain statutory requirement for perfection of Subsection (d)(vi) Liens, and recordation can occur only when the unpaid taxes become past due and thus delinquent.²²

That is not the case with the Subsection (d)(i) Liens. As to those liens, Wyoming law does not require any recordation whatsoever. Indeed, some form of the Subsection (d)(i) Lien has existed in the Wyoming statute books for over a century, and never has any version contained a requirement for notice or recordation of any kind to perfect or grant priority to the lien.²³ Instead, the only requirement for a Subsection (d)(i) Lien to be perfected and enforceable is that it attach. That means that the Subsection (d)(i) Lien is perfected and enforceable when it attaches to “all real property owned by the person against whom the tax was assessed” and the relevant personal property taxed.²⁴

In addition, Wyo. Stat. Ann. § 39-13-108(d)(i) provides that, once attached to the real property of the person against whom the tax is assessed, the Subsection (d)(i) Lien is subject only

²¹ Wyo. Stat. Ann. § 39-13-108(vi)(E).

²² The County concedes that it has not recorded and, therefore, has not perfected any Subsection (d)(vi) Liens against the Taxpayer Debtors’ property. But it was the timing of the Debtors’ chapter 11 filings that prevented the County from doing so. As noted, a Subsection (d)(vi) Lien cannot be perfected until a taxpayer is delinquent. Here, the Debtors filed bankruptcy on May 10, 2019, which was the due date for the Taxpayer Debtors’ second installment of 2018 gross product mine taxes. As such, at no time prepetition could the County have taken steps to record and thus perfect a Subsection (d)(vi) Lien.

²³ See Wyo. Stat. Ann. 107 § 4 (1895); *id.* § 70-6-2858 (1923); *id.* § 39-3-102(a) (1977); *id.* 39-13-108(d)(1) (2017).

²⁴ Wyo. Stat. Ann. § 39-13-108(d)(i).

to prior existing liens and, as such, takes priority over all subsequent liens. Section 39-13-108(d)(i) is not as clear on the priority of the lien on the taxed personal property; however, the statute provides that if the taxed property is transferred and the transferor does not have adequate assets to satisfy the tax, then the lien may be executed and the tax enforced against the taxed property in the hands of the transferee. It follows then that the lien on the taxed personal property is, at least, paramount to the interest of any subsequent transferee, even if that transferee is a bona fide purchaser or creditor.

Although the Subsection (d)(vi) Lien specifically applies to taxes on mineral production, that does not mean that it supplants the availability of the Subsection (d)(i) Lien in relation to the gross mineral product tax. Indeed, nowhere in the *ad valorem* tax statutes has the Wyoming legislature indicated that the Subsection (d)(vi) Lien is the exclusive lien available for taxes related to mineral production. Furthermore, although Wyoming embraces the canon of statutory construction that a specific statute will trump a general statute, that canon only applies when the two statutes conflict.²⁵ And statutes should, in the first instance, be read together “in order that if at all possible they may be harmonized, to avoid conflicting and confusing results.”²⁶ Here, subsections (d)(i) and (d)(vi) of section 39-13-108 do not conflict. The property to which the Subsection (d)(vi) Lien can attach is much more expansive in scope than that of the Subsection (d)(i) Liens, but perfection of the Subsection (d)(vi) Lien cannot occur until the unpaid taxes become delinquent. As such, rather than excluding the Subsection (d)(i) Liens when mineral product taxes are involved, section 39-13-108(d)(vi) adds another layer of protection that enhances the recourse of Wyoming counties for collecting taxes once a tax becomes delinquent.

²⁵ See *Dep’t of Revenue and Taxation v. Irvine*, 589 P.2d 1295, 1299 (Wyo. 1979).

²⁶ *Id.* at 1298.

III. Campbell County Holds Prepetition Subsection (d)(i) Liens That Are Senior to the DIP Liens

As discussed above, the Subsection (d)(i) Liens attach to the produced minerals and all real estate of the taxpayer and become perfected as to all but prior existing liens. The relevant unpaid taxes of the Taxpayer Debtors arose in 2017 as they removed minerals from the ground in Campbell County. Thus, Campbell County holds perfected Subsection (d)(i) Liens on all real estate of the Taxpayer Debtors and all minerals that the Taxpayer Debtors produced in 2017. As these taxes remain unpaid by the Taxpayer Debtors, the liens have not been discharged and remain in effect.

Before the Debtors filed bankruptcy, each of these Subsection (d)(i) Liens became perfected and made senior in priority to all but prior existing liens²⁷ and thus are senior in priority to any of the DIP Liens, which were only perfected, at the earliest, on May 14, 2019, in accordance with the Interim DIP Financing Order. As such, the Debtors cannot properly ask this Court to hold, as a matter of law, that Campbell County holds no liens that are senior in priority to the DIP Liens.²⁸ The County's Subsection (d)(i) Liens are senior to all such liens, and this Court should reject the Debtors' attempt to subordinate the County's liens to the DIP Liens.

²⁷ Wyo. Stat. Ann. § 39-13-108(d)(i).

²⁸ The DIP Lien holders cannot complain for lack of notice of the Subsection (d)(i) Liens. As *ad valorem* taxes are liens under section 39-13-108(d)(i) of the Wyoming Statutes, notice of the taxes serve as notice of the liens. Such notices, together with assessment records and payment status, are a matter of public record in Wyoming, and are available through the County assessor's office. See *Property Search*, Campbell County Wyoming, <https://www.ccgov.net/131/Property-Search>. As such, a simple search of public records would provide sufficient notice that *ad valorem* taxes had been assessed against the Taxpayer Debtors (and that such taxes remain unpaid) and therefore the real estate of the Taxpayer Debtors was subject to Subsection (d)(i) Liens.

IV. The Debtors Have Not Met Their Burden Under Section 364(d) of the Bankruptcy Code to Prime the County’s Prepetition Subsection (d)(i) Liens

Section 364(d) of the Bankruptcy Code provides for prepetition liens to be primed by those necessary to secure postpetition financing, but only if certain conditions are met.²⁹ One of those conditions is that the County must be provided with adequate protection of its prepetition liens.³⁰ The Debtors have not even attempted to make any showing of adequate protection, which is their burden to make.³¹

Indeed, rather than attempting to meet the standards for priming the County’s liens, the DIP Financing Motion simply seeks a declaration that the County has no interest that requires priming at all. As such, the DIP Financing Motion does not show that the County will receive adequate protection. To the contrary, the motion as “supplemented” plainly states that the County will receive nothing for its loss of priority.

Because the DIP Financing Motion does not meet the requirements of section 364(d) of the Bankruptcy Code, the DIP Liens cannot prime the County’s Subsection (d)(i) Liens. The Court should therefore reject the Debtors’ attempt to do so.

V. Additionally, the Debtors’ Attempt to Obtain a Ruling on the Validity, Extent, and Priority of the County’s Liens Is Not Appropriate in the Context of the DIP Financing Motion; an Adversary Proceeding Is Necessary

In addition to the defects described above, the Debtors’ request for an order that Campbell County does not “hold[] any lien, interest or claim on and in respect of *ad valorem* taxes . . . that

²⁹ 11 U.S.C. § 364(d)(1) (“The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if—(A) the trustee is unable to obtain such credit otherwise; and (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be granted.”)

³⁰ *Id.*

³¹ *Id.* § 364(d)(2).

constitutes a DIP Permitted Prior Lien,”³² is procedurally improper. As is plain under Federal Rule of Bankruptcy Procedure 7001, “a proceeding to determine the validity, priority, or extent of a lien” must be brought as an adversary proceeding. The Debtors cannot properly ask this Court to determine as much with regard to Campbell County’s liens in the context of their DIP Financing Motion.

The Debtors might try to argue that, because section 364(d) of the Bankruptcy Code allows the Court to authorize financing arrangements secured by priming liens, the Debtors may prime any liens of Campbell County through a motion to obtain DIP financing. But that argument would be flawed in at least two ways. First, the assumption that priority of liens can be finally determined outside of an adversary proceeding has been met with skepticism in this Court.³³ Second, the DIP Financing Motion as “supplemented” does not merely ask for a ruling that the DIP Liens would prime the liens of Campbell County. Rather, it requests a ruling that Campbell County does not have any liens that were perfected (or may later be perfected and relate back) prior to the Debtors’ bankruptcies. In this respect, the DIP Financing Motion asks this Court to determine the priority of Campbell County’s liens against all other liens perfected prior to Debtors’ petitions.

This proposed ruling regarding the County’s liens is far broader than what § 364 of the Bankruptcy Code contemplates and, indeed, falls squarely into the type of matter that, under the Bankruptcy Rules, must be pursued as an adversary proceeding. The Court should reject the Debtors’ requested determination regarding Campbell County’s liens because such a determination may be made only in an adversary proceeding.

³² DIP Financing Motion at 6.

³³ See *In re Mariner Post-Acute Network, Inc.*, 267 B.R. 46 (Bankr. D. Del. 2001) (without deciding issue, noting skepticism that aspects of liens could have been finally determined on motion to obtain post-petition financing rather than in adversary proceeding).

CONCLUSION

For all the reasons stated above, Campbell County requests that this Court sustain the County's limited objection, deny the requested ruling regarding the County's liens and reject the Debtors' efforts to subordinate the Subsection (d)(i) Liens to the DIP Liens without the County's consent or adequate protection, and grant such other and further relief as this Court deems just and appropriate.

Dated: July 8, 2019

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**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

CLOUD PEAK ENERGY, INC., *et al.*,

Debtors.

Chapter 11

Case No. 19-11047 (KG)

Jointly Administered

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2019, I caused a true and correct copy of *Campbell County's Limited Objection to Debtors' DIP Financing Motion, as Supplemented* to be served upon all parties that are registered or otherwise entitled to receive electronic notification pursuant to the ECF procedures in this District, and via US regular mail and email to the following:

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Dated: July 8, 2019

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